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Before the  
Federal Communications Commission  
Washington, D.C. 20554

MAILED

DEC - 2 2008

In the Matter of

Requests of Progeny LMS, LLC and  
PCS Partners, L.P. for Waiver of  
Multilateration Location and Monitoring  
Service Construction Rules

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WT Docket No. 08-60

FCC Docket No. 08-60

File Nos. 0003422772 *et al.*File Nos. 0003469981 *et al.*

## ORDER

Adopted: November 26, 2008

Released: November 26, 2008

By the Deputy Chief, Wireless Telecommunications Bureau:

## I. INTRODUCTION

1. For the reasons stated below, the Wireless Telecommunications Bureau (Bureau) hereby grants the request of Progeny LMS, LLC (Progeny) and grants in part the request of PCS Partners, L.P. (PCS Partners) for additional time to meet the construction requirements that apply to their respective multilateration Location and Monitoring Service (M-LMS) Economic Area (EA) licenses.<sup>1</sup> Further, on our own motion and as explained in detail below, we grant additional time for each of the four other M-LMS licensees in the 902-928 MHz band to meet their construction requirements. Specifically, we extend the five-year construction requirement to July 19, 2012 for any license that currently must meet that mid-term requirement on or before July 19, 2012, and the ten-year construction requirement to July 19, 2014 for any license that currently must meet that end-of-term requirement on or before July 19, 2014.

## II. BACKGROUND

2. Location and Monitoring Service (LMS) Generally. In 1995, the Commission established LMS as a new service in the 902-928 MHz band, under a hierarchy of spectrum usage rights.<sup>2</sup> Specifically, this band is allocated on a primary basis to Federal radiolocation systems and to Industrial, Scientific, and Medical (ISM) equipment.<sup>3</sup> Federal fixed and mobile services are allocated on a secondary basis to Federal radiolocation systems and ISM equipment. LMS licensees are allocated on a secondary basis to Federal users and to ISM devices and may not cause interference to and must tolerate interference from these users and devices.<sup>4</sup> Amateur radio operations are allocated on a secondary basis to LMS.<sup>5</sup> Finally, unlicensed devices are authorized under Part 15 to use the 902-928 MHz band, but such devices are not afforded interference protection rights and may not cause harmful interference to

<sup>1</sup> An M-LMS licensee must cover one-third and two-thirds of an EA's population within five and ten years of initial license grant, respectively. See 47 C.F.R. § 90.155(d). Alternatively, an M-LMS licensee may make a showing of substantial service in its license area at the five-year and ten-year benchmarks. *Id.*

<sup>2</sup> Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Report and Order*, 10 FCC Rcd 4695 (1995) (*LMS Report and Order*) (adopting rules encompassing the Automatic Vehicle Monitoring (AVM) service for which the Commission had adopted "interim" rules in 1974).

<sup>3</sup> 47 C.F.R. §§ 2.106, 18.301, 18.111(c).

<sup>4</sup> 47 C.F.R. § 90.353(a).

<sup>5</sup> 47 C.F.R. § 97.301.

LMS licensees, amateur operations, or other licensed systems.<sup>6</sup>

3. M-LMS systems are envisioned to track and locate objects over a wide geographic area by measuring the difference in time of arrival or phase of signals transmitted from a unit to a number of fixed points, or from a number of fixed points to the unit that is to be located. Non-multilateration LMS systems transmit data to and from objects passing through particular locations, and are licensed site-by-site.

4. The Commission auctioned M-LMS licenses in 1999 and 2001 (Auctions 21 and 39).<sup>7</sup> With three M-LMS licenses (A, B and C Block) in each of the 176 EAs, there were 528 licenses available at auction. As a result of the two auctions and secondary market disaggregation, six entities currently hold a total of 614 M-LMS licenses: Progeny holds 228 licenses; Skybridge Spectrum Foundation (Skybridge)<sup>8</sup> holds 128 licenses and an associated holding company, Telesaurus Holdings GB, LLC (Telesaurus)<sup>9</sup> holds 129 licenses (collectively, 257 Havens licenses); Helen Wong-Armijo holds 84 licenses; PCS Partners holds 32 licenses; and FCR, Inc. (FCR) holds 13 licenses.

5. Licensees must construct and operate a sufficient number of base stations to serve one-third and two-thirds of an EA's population within five and ten years of initial license grant, respectively.<sup>10</sup> Alternatively, an M-LMS licensee may make a showing of substantial service for its license at the five- and ten-year benchmarks.<sup>11</sup> Under Sections 1.946(c) and 1.955(a)(2) of the Commission's rules,<sup>12</sup> an M-LMS license will terminate automatically as of the construction deadline if the licensee fails to meet the construction requirement, unless it obtains an extension of time to construct under Section 1.946(e),<sup>13</sup> or a waiver of the construction requirement under Section 1.925.<sup>14</sup>

6. In 2003, Havens requested additional time to meet the five-year construction requirement. In 2004, the Bureau's Mobility Division (Division) granted Havens three additional years to

<sup>6</sup> Under Part 15, unlicensed devices may not cause harmful interference to LMS licensees, amateur operations, or other licensed systems in the 902-928 MHz band. See 47 C.F.R. § 90.361. Users of Part 15 devices conforming to specified technical conditions under the safe harbor, however, are insulated from claims in the 902-928 MHz band that such devices cause harmful interference to M-LMS systems. *Id.*

<sup>7</sup> Location and Monitoring Service Auction Closes, Winning Bidders in the Auction of 528 Multilateration Licenses in the Location and Monitoring Service, *Public Notice*, 14 FCC Rcd 3754 (1999); Public Coast and Location and Monitoring Service Spectrum Auction Closes, Winning Bidders Announced, *Public Notice*, 16 FCC Rcd 12509 (2001).

<sup>8</sup> Warren C. Havens holds a controlling interest in Skybridge. We note that the 128 licenses held by Skybridge are the result of a disaggregation transaction from Havens' other licenses held by Telesaurus Holdings GB, LLC.

<sup>9</sup> Mr. Havens also holds a controlling interest in Telesaurus.

<sup>10</sup> 47 C.F.R. § 90.155(d).

<sup>11</sup> *Id.*

<sup>12</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

<sup>13</sup> An extension of time to complete construction may be granted where the licensee demonstrates that the failure to complete construction is due to causes beyond its control. 47 C.F.R. § 1.946.

<sup>14</sup> Under Section 1.925, a waiver may be granted provided the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925.

meet the five-year requirement.<sup>15</sup> In 2005, the Division granted FCR similar relief and, in 2006, the Division granted Progeny relief.<sup>16</sup> Havens sought reconsideration of those extensions.<sup>17</sup> On January 31, 2007, the Division: (1) denied Havens' petition for reconsideration; (2) granted requests for additional time to meet the five-year requirement filed by FCR and M-LMS licensee Helen Wong-Armijo (Wong-Armijo); and (3) granted Telesaurus (for certain licenses) an additional two years to meet its five-year construction requirement, and an additional two years to meet its ten-year requirement.<sup>18</sup> On March 2, 2007, Havens filed an application for review of the Division's denial of his petition for reconsideration,<sup>19</sup> and also filed a petition for reconsideration of the Division's grant of additional time for FCR and Wong-Armijo to comply with their construction requirements.<sup>20</sup> Those challenges are currently pending.

7. When the Commission adopted the LMS rules in 1995, it expected that both M-LMS and non-multilateration LMS systems would play a central role in emerging advanced radio transportation-related services.<sup>21</sup> Non-multilateration systems have been put to use since 1995 with more than 1,200 currently active licenses issued to state and local governments, railroads, and other entities.<sup>22</sup> Additionally, over the past five years, only non-multilateration LMS equipment has been submitted for authorization in the 900 MHz band, whereas there have been no equipment authorizations for M-LMS.<sup>23</sup> The record reflects, moreover, that no M-LMS equipment is commercially available for current deployment in the United States and that no M-LMS licensee provides service today. In March, 2006, the Commission commenced a currently pending rulemaking examining possible revisions to the M-LMS rules.<sup>24</sup>

<sup>15</sup> Request of Warren C. Havens for Waiver of the Five-Year Construction Requirement for his Multilateration Location and Monitoring Service Economic Area Licenses, *Memorandum Opinion and Order*, 19 FCC Rcd 23742 (2004) (*Havens M-LMS Order*).

<sup>16</sup> Request for Extension of Five-Year Construction Requirement, *Letter*, 20 FCC Rcd 4293 (2005) (*FCR Order*); Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses, *Memorandum Opinion and Order*, 21 FCC Rcd 5928 (2006) (*Progeny Order*).

<sup>17</sup> See Warren C. Havens, Telesaurus Holdings GB, LLC, Telesaurus-VPC, LLC and AMTS Consortium LLC, Petition for Reconsideration or Alternative Action, Erratum (filed Apr. 1, 2005); Warren C. Havens, Telesaurus Holdings GB, LLC, Telesaurus-VPC, LLC and AMTS Consortium LLC, Petition for Reconsideration or Alternative Action, Errata Version (filed June 23, 2006).

<sup>18</sup> Multilateration Location and Monitoring Service Construction Requirements, *Order on Reconsideration and Memorandum Opinion and Order*, 22 FCC Rcd 1925 (2007) (*LMS Recon Order*). We note again that Havens has a controlling interest in Telesaurus. See *supra* note 9.

<sup>19</sup> Warren Havens and Telesaurus Holdings GB LLC, Application for Review of Request of Progeny LMS, LLC for a Three-Year Extension of the Five-Year Construction Requirement for its Multilateration Location and Monitoring Services Economic Area Licenses, Grant of Request for Extension of Five-Year Construction Requirement for FCR, Inc.'s Multilateration Location and Monitoring Services Economic Area Licenses (filed Mar. 2, 2007).

<sup>20</sup> AMTS Consortium LLC, Telesaurus VPC LLC and Intelligent Transportation and Monitoring Wireless LLC, Petition for Reconsideration of Request of Helen Wong-Armijo for a Three-Year Extension of the Five-Year Construction Requirement for her Multilateration Location and Monitoring Services Economic Area Licenses, FCR, Inc.'s Requests for Extension of Time for its Multilateration Location and Monitoring Services Economic Area Licenses (filed Mar. 2, 2007).

<sup>21</sup> *LMS Report and Order*, 10 FCC Rcd at 4698 ¶ 5.

<sup>22</sup> The total number of non-multilateration LMS licenses is based on a review of the Commission's Universal Licensing System as of November 26, 2008.

<sup>23</sup> Based on a staff search, as of November 26, 2008, at <https://fjallfoss.fcc.gov/oetcf/eas/reports/GenericSearch.cfm>.

<sup>24</sup> Amendment of the Commission's Part 90 Rules in the 904-909.75 and 919.75-928 MHz Bands, WT Docket No. 06-49, *Notice of Proposed Rulemaking*, 21 FCC Rcd 2809 (2006) (*LMS NPRM*).

8. Progeny Request. On May 1, 2008, Progeny filed a request for waiver of the Commission's M-LMS construction rules with respect to Progeny's EA licenses.<sup>25</sup> On May 5, 2008, the Commission released a Public Notice inviting comment on Progeny's request.<sup>26</sup>

9. In its request, Progeny seeks a waiver pursuant to Section 1.925 of the Commission's rules, or an extension of time pursuant to Section 1.946(e) regarding the construction deadlines for its M-LMS EA licenses that are set forth in Section 90.155(d).<sup>27</sup> Specifically, Progeny requests an additional four years to meet its five-year construction deadline (from July 19, 2008 to July 19, 2012), and an additional four years to meet its ten-year construction deadline (from July 19, 2010 to July 19, 2014).<sup>28</sup>

10. Progeny argues that a grant of its request would be in the public interest because Progeny has demonstrated a commitment since the 1980s to providing M-LMS service, including its potential application to homeland security and critical infrastructure industries that require a high degree of service reliability.<sup>29</sup> Moreover, Progeny contends that a strict application of the construction requirement at this time would be contrary to the public interest.<sup>30</sup>

11. Progeny presents several arguments that a waiver or extension is justified because of its difficulty in procuring M-LMS equipment. Specifically, Progeny notes that the introduction of Global Positioning Satellite (GPS) receivers soon after the creation of the M-LMS rules, including the widespread use of GPS technology in mobile phones pursuant to the Commission's E-911 requirements, has obviated much of the need for multilateration systems and discouraged investment by manufacturers.<sup>31</sup> Progeny contends that no M-LMS equipment is available for use in the United States,<sup>32</sup> and that M-LMS equipment development has been hindered by the hierarchical design of the band for shared usage, including the requirement under rule section 90.353(d) that M-LMS operations must not cause unacceptable interference to unlicensed services in the band.<sup>33</sup> Progeny argues that since all the other M-LMS licensees have had the same difficulty in securing equipment, it is fair and equitable to grant Progeny further relief.<sup>34</sup>

12. Progeny also contends that it has made diligent efforts to procure M-LMS equipment, and provides details in an attachment for which Progeny sought confidential treatment.<sup>35</sup> Havens argued that the attachment should not be granted confidential treatment, or in the alternative, should be provided in redacted form so that the record may provide the public with the fullest possible opportunity to comment

<sup>25</sup> Progeny LMS, LLC Request for Waiver and Limited Extension of Time (filed May 1, 2008) ("Progeny Request").

<sup>26</sup> Wireless Telecommunications Bureau Seeks Comment on Request by Progeny LMS, LLC for Waiver of Location and Monitoring Service (LMS) Construction Rule, WT Docket No. 08-60, *Public Notice*, 23 FCC Rcd 7368 (2008). Comments were due June 4, 2008, and reply comments were due June 19, 2008.

<sup>27</sup> Progeny Request at 1.

<sup>28</sup> *Id.* As discussed earlier, Progeny's five-year construction deadline had been previously extended by three years, from July 19, 2005, to July 19, 2008, as a result of the Division's 2006 waiver grant. *See supra* note 16.

<sup>29</sup> Progeny Request at 3, 4.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 6; *c.f.* Comments of IEEE 802.18 at 2 (filed June 3, 2008) ("IEEE Comments").

<sup>32</sup> Progeny Request at 7, citing *LMS Recon Order*, 22 FCC Rcd at 1926 ¶ 5.

<sup>33</sup> Progeny Request at 9, 10, citing 47 C.F.R. § 90.353(d).

<sup>34</sup> Progeny Request at 10, 11.

<sup>35</sup> *See id.* at 12; Letter from Bruce A. Olcott and Joshua T. Guyan, counsel for Progeny LMS, LLC, to Marlene Dortch, Secretary, FCC, Progeny LMS, LLC Request for Confidential Treatment; Request for Waiver and Limited Extension of Time (filed May 1, 2008).

on Progeny's showings.<sup>36</sup> On August 15, 2008, the Division provided a redacted version of the attachment to all parties in this proceeding pursuant to a request of Havens under the Freedom of Information Act (FOIA).<sup>37</sup> On August 25, 2008, Havens filed comments in response to the redacted attachment, while asking for additional time to comment further.<sup>38</sup> However, Havens filed the comments and the request for additional time after the applicable filing deadline.<sup>39</sup> Furthermore, Havens failed to serve the other parties to this proceeding with the request for additional time.<sup>40</sup> Nonetheless, in response to the Havens filing, on August 26, 2008, Progeny filed a response to Havens' comments, and an opposition to the request for additional time.<sup>41</sup>

13. Finally, Progeny contends in its request that with a grant of an extension for the construction requirements, the spectrum will not lie fallow because the band currently is shared among Federal government radiolocation systems, ISM devices, licensed amateur radio operations and unlicensed Part 15 equipment.<sup>42</sup> While Progeny also has stated that the shared nature of the band inhibits the manufacture of M-LMS equipment, Progeny argues that the shared nature itself ensures that the spectrum will not be under-utilized, thus allaying the Commission's ongoing concern that spectrum could be warehoused without any benefit to the public.<sup>43</sup>

14. In its objections to the Progeny request, Havens argues that Progeny fails to meet the Commission's due diligence standard for grant of construction deadline extension requests as articulated by the D.C. Circuit in *Advanced Communications v. FCC*.<sup>44</sup> Havens also argues that Progeny initially obtained its licenses in violation of FCC rules because it was not a bidder in the auction, and had affiliates with attributable revenues that it did not disclose.<sup>45</sup> Additionally, Havens argues, the Bureau erred when

<sup>36</sup> See Warren Havens, Telesaurus Holdings GB LLC, Skybridge Spectrum Foundation, Joint Petition to Deny at 10 (filed June 2, 2008) ("Havens Petition to Deny"); Comments of Skybridge Foundation and Associates at 1, 2 (filed June 4, 2008) ("Skybridge Comments").

<sup>37</sup> See Letter from Lloyd W. Coward, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, to Warren Havens, President, Skybridge Spectrum Foundation, and Jimmy Stobaugh, General Manager, Skybridge Spectrum Foundation, FOIA Control. No. 2008-613, WT Docket 08-60 (dated Aug. 15, 2008) ("FOIA Letter").

<sup>38</sup> Warren C. Havens, Skybridge Spectrum Foundation, Telesaurus Holdings GB LLC & Associates, Intelligent Transportation & Monitoring Wireless LLC, AMTS Consortium LLC, Telesaurus VPC LLC, Further Comments (Based on the Recently Released Redacted Attachment A) (filed Aug. 25, 2008) ("Havens Further Comments").

<sup>39</sup> The Bureau provided Havens and all other parties to WT Docket 08-60 five business days from the date of the letter ruling (August 15, 2008) to comment on the redacted attachment; comments were therefore due before midnight, Eastern Time, August 22, 2008. See FOIA Letter at 2, *supra* note 37, and 47 C.F.R. § 1.4(f). However, the Havens Further Comments were received by the Commission's Electronic Comment Filing System (ECFS) after the August 22, 2008 deadline.

<sup>40</sup> See 47 C.F.R. § 1.47.

<sup>41</sup> Progeny LMS, LLC, Response of Progeny LMS, LLC and Opposition to Request for Additional Time (filed Aug. 26, 2008). In its response to Havens' Further Comments, Progeny maintains that the attachment is consistent with its extension request, which is based upon the unavailability of M-LMS equipment under the existing rules rather than under any proposed rules. *Id.* at 5, 6. Progeny also objects to the request for additional time, disagreeing with Havens that a full 30 days is required for comment on the attachment as an "initial pleading," and that the attachment's reference to an earlier *ex parte* necessitates more time for analysis. *Id.* at 2-5.

<sup>42</sup> Progeny Request at 14.

<sup>43</sup> *Id.*

<sup>44</sup> Havens Petition to Deny at 6, citing *Advanced Communications Corp. v. FCC*, 84 F.3d 1452, 318 U.S. App. D.C. 78 (1996) (Commission's anti-warehousing policy relies on enforcement of due diligence rules, where totality of circumstances includes efforts made and not made together with extant difficulties within ultimate goal of service to the public).

<sup>45</sup> Havens Petition to Deny at 6, 7.

granting the first extension request on the basis that Progeny performed due diligence, and in turn, the second extension request merely cites to the former "due diligence."<sup>46</sup> Havens further contends that *Progeny lacks credibility and candor, and that it cannot assert that it is actually seeking equipment when also arguing in the pending rulemaking proceeding that the rules for said equipment and the service to be provided by the equipment are not viable.*<sup>47</sup> According to Havens, use of the spectrum by others on an unlicensed basis does not warrant grant of the extension request.<sup>48</sup>

15. In separate comments, the Havens affiliate Skybridge argues that Progeny's extension request is based not on the current rules of showing due diligence, but rather on what it requests in the pending rulemaking, including the recognition of "funding...research" as due diligence.<sup>49</sup> According to Skybridge, Progeny's assertion that its spectrum is being used by unlicensed devices introduces the concern, unaddressed, that Progeny's proposed changes to the M-LMS service could cause interference to those devices.<sup>50</sup> Skybridge contends, however, that it would be reasonable for the Commission to grant a blanket extension to all M-LMS licenses past the date of a decision on the *LMS NPRM*.<sup>51</sup>

16. The Radio Regulatory Technical Advisory Group within the Institute of Electrical and Electronics Engineers, Inc. 802 (IEEE 802.18) contends that Progeny's failure to meet its construction requirements should not be rewarded with a further extension.<sup>52</sup> IEEE 802.18 states that M-LMS no longer is a viable technology given the predominance of GPS, and there is no evidence that equipment manufacturers would have any incentive to provide Progeny with equipment to deploy M-LMS services, given the ubiquity of the GPS infrastructure and technology.<sup>53</sup> IEEE 802.18 concludes that Progeny's licenses should be canceled and the allocation for M-LMS withdrawn.<sup>54</sup>

17. The Wireless Communications Association International, Inc. (WCA) supports Progeny's request, reasoning that the justification for granting Progeny's request is similar to that for LMDS, where viable and affordable equipment is difficult to obtain; additional time is needed to develop the equipment given evolving business models; economic and technical constraints are beyond the licensee's control; and the public interest would be harmed by forcing licensees to deploy "stop-gap" systems that are merely meant to comply with the Commission's deadlines.<sup>55</sup> WCA adds that the Commission similarly extended the five-year build-out deadline for Broadband Radio Service (BRS) Basic Trading Area licensees, given

<sup>46</sup> *Id.* at 7, 8. According to Havens, Progeny also fails to define the service and equipment it suggests it is seeking but cannot get, and fails to show that it is pursuing the deployment of M-LMS, which has been defined as an Intelligent Transportation System (ITS) radio service with a construction requirement that includes vehicle multilateration. *Id.* at 8, 9.

<sup>47</sup> *Id.* at 9.

<sup>48</sup> *Id.* at 10.

<sup>49</sup> Skybridge Comments at 3, 4.

<sup>50</sup> *Id.* at 4, 5.

<sup>51</sup> *Id.* at 5. In further separate comments, Skybridge argues that although Section 1.933(d)(5) provides that construction deadline extension requests need not be placed on public notice, Progeny's initial extension request was placed on public notice (regardless of whether its subsequent pleading was filed confidentially), and Progeny arguably is not seeking an extension under the current rules but rather under proposed changes to the rules being considered in the related *LMS NPRM*. Supplemental Comments of Skybridge Foundation and Associates at 1, 2 (filed June 4, 2008) ("Skybridge Supplemental Comments").

<sup>52</sup> IEEE Comments at 2.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Comments of Wireless Communications Association International, Inc. at 1-3 (filed June 4, 2008) ("WCA Comments").

the pendency of a rulemaking that could change policies for that spectrum.<sup>56</sup>

18. In its reply comments, Progeny argues that IEEE 802.18's comments, while urging denial of the extension request, actually support Progeny's argument by emphasizing that equipment manufacturers currently lack the incentive to enter the M-LMS market.<sup>57</sup> Progeny also contends that its delays in constructing its network are not of its own making, but rather the failure of equipment manufacturers to construct the necessary equipment despite Progeny's solicitations.<sup>58</sup> Progeny adds that its request is not based on unavailability of equipment for a possible future service arising out of the pending rulemaking, but rather based upon current unavailability for the existing M-LMS service.<sup>59</sup> Finally, with respect to the claim that it secured its spectrum improperly, Progeny argues that it, as well as the Commission, have already addressed the alleged problems concerning the outcome of the 1999 auction, and they do not warrant further consideration here.<sup>60</sup>

19. In its reply comments, Skybridge argues that WCA failed to comment on the substance of the extension request and on the lack of availability of Progeny's confidential attachment.<sup>61</sup> Skybridge adds that IEEE 802.18 erroneously argues that GPS has mooted the M-LMS technology, ignoring the arguments that M-LMS can use multilateration to improve the accuracy and reliability of GPS needed for road lane-based and other essential ITS radio services.<sup>62</sup>

20. PCS Partners Request. On June 11, 2008, PCS Partners filed a similar request for extension of time to meet the construction requirements for its EA licenses.<sup>63</sup> In its request, PCS Partners seeks an extension of time pursuant to Section 1.946(e) regarding the construction deadlines for its M-LMS EA licenses that are set forth in Section 90.155(d).<sup>64</sup> Specifically, PCS Partners requests an additional four years to meet its five-year construction deadline, and an additional four years to meet its ten-year construction deadline.<sup>65</sup> PCS Partners argues that there has been no material change in the equipment market since the Commission's recent determinations that a lack of M-LMS equipment makes it impossible for licensees to meet the five-year construction requirement.<sup>66</sup> PCS Partners further argues that its several discussions with equipment manufacturers have confirmed the lack of any equipment.<sup>67</sup> PCS Partners also shares Progeny's view that spectrum sharing in the M-LMS band has hindered the ability of licensees to secure equipment, given the requirement for M-LMS licensees to demonstrate through field tests that equipment does not cause unacceptable interference to Part 15 unlicensed devices in the band, which themselves utilize a wide and changing array of power levels and technical parameters.<sup>68</sup> Finally, PCS Partners asserts that there is nothing in the record of the pending LMS

<sup>56</sup> *Id.* at 3.

<sup>57</sup> Reply Comments of Progeny LMS, LLC at 2, 3 (filed June 19, 2008) ("Progeny Reply Comments").

<sup>58</sup> *Id.* at 5, 6.

<sup>59</sup> *Id.* at 6, 7.

<sup>60</sup> *Id.* at 7.

<sup>61</sup> Reply Comments of Skybridge Foundation and Associates at 1 (filed June 19, 2008) ("Skybridge Reply Comments").

<sup>62</sup> *Id.* at 1, 2.

<sup>63</sup> PCS Partners, L.P. Request for Extension of Time (filed June 11, 2008) ("PCS Partners Request").

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 4, citing *LMS Recon Order*, *supra* note 18.

<sup>67</sup> PCS Partners Request at 4.

<sup>68</sup> *Id.* at 5-6, citing *Progeny Order*, 21 FCC Rcd at 5932 ¶ 13.

rulemaking proceeding (WT Docket No. 06-49) "to suggest that equipment will be available by [its] July 25 construction deadline."<sup>69</sup> Specifically, PCS Partners notes that while ATLIS Wireless LLC (ATLIS) (a Havens-controlled entity) argues that TETRA technology may be feasible, even ATLIS concedes that "TETRA...to date is still not sold in the US due to Motorola's assertions that it will sue, for patent infringement, entities that buy and use TETRA in the US."<sup>70</sup>

### III. DISCUSSION

21. After review of the record in this proceeding, and based upon the totality of the circumstances, we find that a grant of Progeny's request, and a partial grant of PCS Partners' request, for an extension of time to meet their respective build-out requirements, is warranted. We also find that the record supports the grant, on our own motion, of additional time for each of the other four M-LMS licensees (Skybridge, Telesaurus, FCR and Wong-Armijo) to meet their respective build-out obligations. In so doing, we provide a more uniform time-frame for all of the M-LMS EA licensees to meet their construction requirements. Specifically, we extend: (1) the five-year construction requirement to July 19, 2012 for any license that currently must meet that mid-term requirement on or before July 19, 2012; and (2) the ten-year construction requirement to July 19, 2014 for any license that currently must meet that end-of-term requirement on or before July 19, 2014.

22. We agree with commenters that M-LMS equipment continues to be unavailable for use in the 900 MHz Band,<sup>71</sup> and we find that this circumstance is a substantial factor warranting relief for M-LMS licensees. As noted above, over the past five years, no M-LMS equipment has been submitted for authorization in the 900 MHz band.<sup>72</sup> In addition, no M-LMS equipment is commercially available for current deployment in the United States, and no M-LMS licensee provides service today. Indeed, as the Commission recognized in initiating the *LMS NPRM*, the significant restrictions on M-LMS operations in the Commission's current M-LMS rules may have contributed to the lack of M-LMS equipment and services being developed.<sup>73</sup>

23. We also acknowledge the regulatory uncertainty engendered by the pending M-LMS rulemaking, which was initiated as a substantial examination of the current rules to determine whether new approaches could facilitate more efficient use of the M-LMS Band.<sup>74</sup> The Commission recently discussed regulatory uncertainty as a factor supporting the grant of an extension request of MariTEL, Inc. in the VHF Public Coast service ("*MariTEL*").<sup>75</sup> In *MariTEL*, the Commission stated that it, "as a general matter, has denied requests for waivers and/or extensions of compliance deadlines that are based on alleged regulatory uncertainty."<sup>76</sup> However, in granting MariTEL relief, the Commission stated that "in this unique context, the regulatory uncertainty engendered by the [Notice of Proposed Rulemaking] is a

<sup>69</sup> PCS Partners Request at 6. We note that PCS Partners, contending that it has made diligent efforts to procure M-LMS equipment, provides details in a proprietary attachment for which PCS Partners has sought confidential treatment. See *id.* at 4; PCS Partners, L.P., Confidential Treatment Requested, Att. 1-A (filed June 11, 2008). In granting relief, we do not rely on any of the detail provided in PCS Partners' proprietary attachment, just as we find herein that Progeny's proprietary attachment is not decisional. See *infra* para. 25; see also *supra* note 37.

<sup>70</sup> PCS Partners Request at 6.

<sup>71</sup> See Progeny Request at 9, 10; PCS Partners Request at 4-6; WCA Comments at 2, 3.

<sup>72</sup> Based on a staff search, as of November 26, 2008, at <https://fjallfoss.fcc.gov/oetcf/eas/reports/GenericSearch.cfm>.

<sup>73</sup> *LMS NPRM*, 21 FCC Rcd at 2816, ¶ 18.

<sup>74</sup> *LMS NPRM*, 21 FCC Rcd at 2810, ¶ 1.

<sup>75</sup> See MariTEL, Inc. Request to Extend Construction Deadline for Certain VHF Public Coast Station Geographic Area Licenses, *Memorandum Opinion and Order*, 22 FCC Rcd 14074, 14085 ¶ 19 (2007).

<sup>76</sup> *Id.* at 14085 ¶ 19.



factor warranting an additional extension of MariTEL's five-year build-out deadlines."<sup>77</sup> Similarly, we find here that the pendency of the LMS NPRM potentially revisiting the M-LMS rules, along with the demonstrated lack of available M-LMS equipment, is a factor warranting a further extension of time for all M-LMS licensees.

24. Turning to Havens' Petition to Deny filed against Progeny's Extension request, we find, as an initial procedural matter, that the Petition is barred by Section 309 of the Communications Act of 1934.<sup>78</sup> Section 309(d)(1) provides that any party in interest may file a petition to deny against any application to which 309(b) applies.<sup>79</sup> Section 309(b), however, does not apply to an application for "extension of time to complete construction of authorized facilities."<sup>80</sup> Although we are dismissing as procedurally defective the Petition to Deny, we note that Skybridge (a Havens affiliate) incorporated Havens' Petition to Deny into its comments,<sup>81</sup> and we accordingly address the substance of Havens' Petition to Deny in considering Skybridge's comments.

25. Havens, citing *Advanced Communications*,<sup>82</sup> argues that Progeny has failed to demonstrate requisite due diligence justifying an extension of time.<sup>83</sup> We find that Havens' reliance on *Advanced Communications* is misplaced. There, the Court upheld a Commission decision denying a direct broadcast satellite (DBS) licensee a buildout extension because mere promotional efforts by the licensee were not sufficient when other licensees in the band were successfully providing service.<sup>84</sup> Here, in the case of the Progeny/PCS Partners' requests before us, no M-LMS licensees are successfully providing service in the band, as noted above.

26. We also reject Havens' argument that no other M-LMS licensee should be afforded relief in this band, absent a rulemaking, because no other M-LMS licensee has met Havens' level of effort in seeking to have equipment manufacturers develop marketable equipment in the 902-928 MHz band.<sup>85</sup> Given the unusual circumstances in this band affecting all M-LMS licensees, we do not find licensee due diligence to be a controlling factor in our determination that band-wide relief is warranted. In this regard, we do not find decisionally significant any of the detail provided by Progeny in its proprietary attachment, encompassing the information under seal as well as that available for public inspection in the redacted document.<sup>86</sup> As explained above, we find more significant the evidence in the record that there currently

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<sup>77</sup> *Id.* at 14088-89 ¶ 26.

<sup>78</sup> 47 U.S.C. § 309.

<sup>79</sup> 47 U.S.C. § 309(d)(1).

<sup>80</sup> 47 U.S.C. § 309(c)(2)(D).

<sup>81</sup> See Skybridge Comments at 1.

<sup>82</sup> See *supra* note 44.

<sup>83</sup> Havens Petition to Deny at 6, citing *Advanced Communications Corp. v. FCC*, 84 F.3d 1452, 318 U.S. App. D.C. 78 (1996).

<sup>84</sup> The Court relied on the Commission's explanation that, "[w]hile promotional efforts may be laudable, those efforts are not an adequate substitute for the concrete progress toward the construction and operation of a DBS system," and found no error in the Commission's conclusion that the licensee had "failed to demonstrate the required 'concrete progress.'" See *Advanced Communications*, 84 F.3d at 3.

<sup>85</sup> In fact, when analyzed under the *Advanced Communications* "due diligence" standard applicable to DBS licensees, but cited by Havens in the LMS context, Havens also arguably has failed to make "concrete progress" towards constructing and operating a system, given the resulting lack of available M-LMS equipment notwithstanding his "promotional efforts."

<sup>86</sup> See *supra* note 37.

is no commercially available M-LMS equipment.<sup>87</sup> In addition, we disagree with Havens that Progeny's and PCS Partners' comments in the pending M-LMS rulemaking somehow undercut their requests for relief based on the existing rules,<sup>88</sup> as a party may seek alternate forms of relief.

27. Turning to Havens' filings related to Progeny's proprietary attachment, as noted above, on August 15, 2008, the Bureau provided interested parties five business days (*i.e.*, until August 22, 2008), to file comments on Attachment A to Progeny's Request.<sup>89</sup> Havens filed a document captioned "Further Comments," which contained both comments and a motion for more time to comment on Attachment A, after the filing deadline.<sup>90</sup> In order to ensure a complete record before us, we will treat the comment portion of Havens' late-filed Further Comments as an informal request for Commission action.<sup>91</sup>

28. Havens claims in his Further Comments that Progeny holds no valid M-LMS licenses.<sup>92</sup> We note that Havens and various Havens-controlled entities also raise this argument in more detail in other pending proceedings.<sup>93</sup> The relief granted Progeny in this order is without prejudice to Havens' allegations concerning Progeny's status as an M-LMS licensee. Havens next argues that Attachment A does not demonstrate Progeny made sufficient efforts to develop M-LMS equipment.<sup>94</sup> As explained above, we do not rely on any assertion of Progeny in Attachment A regarding M-LMS equipment development to support our decision that the public interest is served by granting band-wide relief in this proceeding. Accordingly, we need not address Havens' arguments regarding the sufficiency of such equipment development efforts.

29. We also reject Havens' request for additional time to comment on Attachment A (a single-page document). Havens untimely filed his request for additional time after comments were due on the Attachment, and he failed to serve the request on the parties to this proceeding as required by Section 1.46.<sup>95</sup> In any event, as noted above, our decision in this proceeding does not flow from any

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<sup>87</sup> We also note that Havens, without reference to any licensee's level of due diligence, supports in an opposing pleading the grant of a "blanket extension to all LMS-M [sic] licenses it deems currently valid for a substantial number of years past the date of a decision on the LMS-M [sic] NPRM." See Skybridge Comments at 5.

<sup>88</sup> Havens Petition to Deny at 9.

<sup>89</sup> See *supra* note 37.

<sup>90</sup> See *supra* notes 37-39 and associated text. We note that under Section 1.4(f) of the Commission's rules, documents filed electronically must be received by the Commission's electronic filing system before midnight on the filing date. See 47 C.F.R. § 1.4(f); Electronic Filing of Documents in Rulemaking Proceedings, GC Docket No. 97-113, *Report and Order*, 13 FCC Rcd 11322, 11331 ¶ 19 (1998) ("ECFS Order"). Additionally, a time stamp mechanism is built into the Commission's Electronic Comment Filing System, including automatic notification to the commenter of the official filing date and time. See *ECFS Order*, 13 FCC Rcd at 11322 ¶ 20. Finally, we note that pleadings are considered to be filed upon their receipt by the Commission, rather than the time of attempted submission. See 47 C.F.R. § 1.7.

<sup>91</sup> See 47 C.F.R. § 1.41 (informal requests for Commission action).

<sup>92</sup> Havens Further Comments at 2-3. Havens made similar arguments in this proceeding in a document captioned "Petition to Deny," which he submitted with the Skybridge Comments.

<sup>93</sup> See *e.g.*, *Ex Parte* of Telesaurus Holdings GB LLC, WT Docket 06-49 (filed May 7, 2007); Petition for Reconsideration and, in the Alternative, Petition to Deny or Request Under Section 1.41, filed January 11, 2008 by Telesaurus Holdings GB LLC, Intelligent Transportation and Monitoring Wireless LLC, AMTS Consortium LLC and Telesaurus-VPC LLC re: grant of transfer of control applications under ULS File Nos. 0003250058 and 0003274382.

<sup>94</sup> Further Comments at 3-4.

<sup>95</sup> See 47 C.F.R. § 1.46(c) (movants for extensions of time filed less than seven days prior to deadline must serve motion on other parties and orally notify them); see also JNE Investments, Inc. Request to Toll the Period to (continued....)

assertion in Attachment A, but rather from the evidence—already in the record—that no M-LMS equipment is available at this time. Similarly, we do not find Progeny's opposition to the Havens request decisionally significant.

30. We therefore grant Progeny's request for extensions of its mid-term and end-of-term construction benchmarks to July 19, 2012 and July 19, 2014, respectively. We believe that these dates represent a reasonable amount of time to develop M-LMS operations.<sup>96</sup> Similarly, we extend PCS Partners' benchmarks to these dates, and we deny PCS Partners' request for relief to the extent that it seeks additional time beyond those dates. Further, as we are extending relief to each of the remaining M-LMS licensees given the lack of commercially available equipment, we believe it is in the public interest to afford these licensees similar deadlines, with certain exceptions noted below, as those of Progeny and PCS Partners. Accordingly, we extend the five-year construction requirement to July 19, 2012 for any license that currently must meet that mid-term requirement on or before July 19, 2012, and the ten-year construction requirement to July 19, 2014 for any license that currently must meet that end-of-term requirement on or before July 19, 2014.

31. We do note that several licenses held by Havens affiliates, Skybridge and Telesaurus, currently have end-of-term benchmarks in 2017, and we find no basis to accelerate the required compliance dates resulting from the 2007 grant of these licenses. However, considering the significant regulatory relief that has been granted to M-LMS licensees, we do not anticipate further extensions will be granted absent extraordinary circumstances. We also note that any relief granted herein, including the revised construction benchmarks, is subject to any Commission action in the pending rulemaking.

#### IV. ORDERING CLAUSES

32. ACCORDINGLY, IT IS ORDERED THAT, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.925, 1.946, 90.155(d), the request of Progeny LMS, LLC, filed on May 1, 2008, for a four-year extension of time to meet its current five- and ten-year construction requirements for its multilateration Location and Monitoring Service Economic Area licenses, File Nos. 0003422772–0003422999, and 0003423004–0003423231 IS GRANTED, and that the five-year construction deadline IS HEREBY EXTENDED until July 19, 2012, and the ten-year construction deadline IS HEREBY EXTENDED until July 19, 2014.

33. IT IS FURTHER ORDERED THAT, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.925, 1.946, 90.155(d), the request of PCS Partners, L.P., filed on June 11, 2008, for a four-year extension of time to meet its original five- and ten-year construction requirements for its multilateration Location and Monitoring Service Economic Area licenses, File Nos. 0003469981–0003470012, IS GRANTED IN PART AND DENIED IN PART, and that the five-year construction deadline IS HEREBY EXTENDED until July 19, 2012, and the ten-year construction deadline IS HEREBY EXTENDED until July 19, 2014.

34. IT IS FURTHER ORDERED THAT, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.3, 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, 1.946, 90.155(d), FCR, Inc. BE GRANTED additional time to meet its current five- and ten-year construction requirements for its multilateration Location and Monitoring Service Economic Area licenses, Call Signs WPTH 901–WPTH 908 and WPOJ 871–WPOJ 875, and that the five-year construction deadline IS HEREBY EXTENDED until July 19, 2012, and the ten-year construction deadline IS HEREBY EXTENDED until July 19, 2014.

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Construct Unbuilt Station KSDG(AM), Julian, California, *Memorandum Opinion and Order*, 23 FCC Rcd 623, 628–629 ¶ 14 (2008).

<sup>96</sup> We note that the relief granted will in some cases extend build-out deadlines beyond a licensee's expiration date. However, today's action in no way extends an M-LMS licensee's applicable license term.

35. IT IS FURTHER ORDERED THAT, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.3, 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, 1.946, 90.155(d), Skybridge Spectrum Foundation BE GRANTED additional time to meet its current five-year construction requirement for its multilateration Location and Monitoring Service Economic Area licenses at Call Signs WQHU 548-WQHU 675, and its current ten-year construction requirement for its multilateration Location and Monitoring Service Economic Area licenses at Call Signs WQHU 548-WQHU 642, and that the five-year construction deadline for the licenses identified above IS HEREBY EXTENDED until July 19, 2012, and the ten-year construction deadline for the licenses identified above IS HEREBY EXTENDED until July 19, 2014.

36. IT IS FURTHER ORDERED THAT, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.3, 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, 1.946, 90.155(d), Telesaurus Holdings GB, LLC BE GRANTED additional time to meet its current five-year construction requirement for its multilateration Location and Monitoring Service Economic Area license, Call Sign WQGN 602, and that the five-year construction deadline IS HEREBY EXTENDED until July 19, 2012.

37. IT IS FURTHER ORDERED THAT, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.3, 1.925, 1.946 and 90.155(d) of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, 1.946, 90.155(d), Helen Wong-Armijo BE GRANTED additional time to meet her current five- and ten-year construction requirements for her multilateration Location and Monitoring Service Economic Area licenses, Call Signs WPTH 955-WPTH 999 and WPTI 200-WPTI 238, and that the five-year construction deadline IS HEREBY EXTENDED until July 19, 2012, and the ten-year construction deadline IS HEREBY EXTENDED until July 19, 2014.

38. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i) and 309 of the Communications Act, as amended, 47 U.S.C. §§ 154(i) and 309, and Section 1.939 of the Commission's rules, 47 C.F.R. § 1.939, the Petition to Deny filed by Warren Havens, Telesaurus Holdings, GB LLC, Skybridge Spectrum Foundation *et. al.* on June 4, 2008 IS HEREBY DISMISSED.

39. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), and Section 1.46(c) of the Commission's rules, 47 C.F.R. § 1.46(c), the Motion for Extension of Time filed by Skybridge Foundation and Associates *et. al.* on August 25, 2008 IS HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joel D. Taubenblatt  
Deputy Chief, Wireless Telecommunications Bureau